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# RAILROADS AND MOTOR CARRIERS —COMPETITION OR COORDINATION—

HERBERT BURSTEIN†

THE CRISIS IN AMERICAN transportation has been dramatized by the plight of the railroad system and brought into sharp focus by the recent insolvency proceedings instituted by one major railroad<sup>1</sup> and the impending or threatened bankruptcy of several others. These circumstances are or ought to be especially significant because they suggest a methodology, lessons and techniques for dealing with the varieties of economic problems which confront all of American industry. Indeed the decline of the railroad empire is history which other organs of private enterprise may recapitulate if the errors and failures of management, labor, Congress and the regulatory agencies are repeated.

A search for the origins of the "railroad problem" leads to the pluralistic complex whose components are the changing character of the American economy, the derelictions of management, the parochialism and, worse, the frequently anarchical conduct of the railway unions, the inadequacy of Congressional action, and the limited contribution of the administrative agency charged with evaluating the nature and content of the relevant forces and mandated to propose and promote lasting solutions.

## THE CURRENT STATUS OF RAILROADS

Insight into the magnitude of the task of saving the railroads is furnished by recent data which shows that between 1959 and early 1961, the volume of traffic handled by carriers regulated by the Interstate Commerce Commission rose while earnings declined. Thus, the revenues for eight of the groups of regulated carriers aggregated \$19.5 billion for calendar 1959; \$19.3 billion for calendar 1960; and, \$18.8 billion for the twelve months ended June 30, 1961.<sup>2</sup> Although

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1. In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor, D. Conn., July 7, 1961.

2. 75 I.C.C. Ann. Rep. 13 (1961). In this connection it may be noted that discontinuance of passenger trains has not stemmed the passenger train deficits. YEARBOOK OF RAILROAD INFORMATION (1959 ed.).

railroads continued to receive the largest part of the aggregate receipts, their share fell 3.0% in 1960, and 7.8% in fiscal 1961, from the 1959 level.<sup>3</sup> So, too, from 1959 to 1961, the percentage of ton-miles of traffic handled by railroads and electric railways, including express and mail, declined from 44.97% to 43.51% (and this trend threatens to accelerate). In 1961, the 104 Class I systems which conduct 98% of the nation's rail business earned less than 2% on their \$28 billion plant investment and even this modest achievement was made possible by deferring \$235 million of essential maintenance. More important, perhaps, is the fact that profits earned on freight no longer absorbs the passenger deficit, and unhappily some railroads have begun to experience losses in their freight operations, as the recent experience of the New York, New Haven and Hartford Railroad graphically demonstrates. More than fifty years ago, the New Haven Railroad was a sterling example of growth, progress and financial stability. For example, the Atchison, Topeka & Santa Fe Railway Company, operating 9,000 miles of road into ten states earned \$3.5 million as compared to earnings of \$15.8 million by New Haven on its 2,100 miles of road (a portion of which was leased to it). New Haven was paying a dividend of approximately \$8.00 a share on its common which sold at or about \$135.00 a share.<sup>4</sup> Misdeeds, both financial and operational, and a change in the economic climate in New England then began to plague the railroad and in 1935 it filed a petition under Section 77 of the Bankruptcy Act.<sup>5</sup> In 1947, the railroad emerged from the reorganization proceedings but with the exception of the war period, soon began to suffer drastic operating losses. Finally, in 1961, the railroad was obliged to turn, once again, to the Bankruptcy Court for relief,<sup>6</sup> after having borrowed millions of dollars from the United States Government.

A comparison of the earlier New Haven reorganization with the present one highlights the impact of changing economic conditions

3. *Id.* at 13. The crisis reached into other areas. Thus, the eleven major United States airlines reported a combined loss of \$34 million in 1961 as compared to a \$4.5 million aggregate profit in 1960. This loss was suffered despite a four per cent rise in revenues to a record \$2 billion (N.Y. World-Telegram, Apr. 3, 1962, p. 42, col. 1). On April 5, 1962, the President sent his 7,500-word "package" proposal to help transportation to Congress. 109 Traffic World 12 (April 7, 1962). In a speech delivered to the New York Society of Security Analysts, the president of the American Trucking Associations predicted that within two years, trucks would carry more revenue freight than do the railroads. N.Y. Times, July 7, 1962, p. 30, col. 2.

4. Gotham, *New Haven: What Went Wrong?* 21 TRAINS 19, 20 (1961); BRANDEIS, FINANCIAL CONDITION OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO. (1907).

5. *Palmer v. Massachusetts*, 308 U.S. 79 (1939).

6. In the Matter of the New York, New Haven & Hartford Railroad Company, *supra*, n. 1; New York, New Haven & Hartford Railroad Loan Guaranty, 312 I.C.C. 471 (1961).

upon the railroad industry. Thus, in the 1935 reorganization, the objective was to reduce fixed charges to less than \$7 million annually because the income derived from operations then being conducted was adequate for that purpose. In 1961, fixed charges did not exceed the earlier figure but income was insufficient to meet this burden despite the fact that revenues in 1960 were almost twice as much as they were in 1935. Unfortunately, maintenance and equipment costs doubled from \$20 million to \$40 million; equipment obligations trebled from \$13.2 million to \$41.7 million; the average wage of supervisory employees doubled and the average hourly wage rates increased from 68 cents an hour to \$2.56 an hour. Notwithstanding the reduction in the total number of employees, over-all labor costs increased from \$35 million in 1935 to \$77 million in 1961 (to which substantial federal payroll taxes apply). Criticism of labor and management for the resulting bankruptcy may comfort those who refuse to face up to the stark and unpleasant realities of modern economic life. The fact is that New Haven's difficulties reflect irresistible economic imperatives originating partially in the physical nature of New Haven's structure but growing, primarily, out of external developments which no individual or group could arrest. New Haven, for one thing, is a short haul line so that seventy-five per cent of its traffic originates outside of New England; hence, it must "hire" a large number of foreign rail cars at burdensome per diem car charges. Besides, it has a maze of small branches with the consequence that about one-third of its miles of road account for almost eighty per cent of total gross freight revenues. This spells palpably uneconomic operations over the balance of the line. An emergency arose, however, when the volume of freight on presumably profitable lines declined: in 1960, carload traffic fell 5.9% from 1959 levels and the volume of important commodities carried by the railroad was sharply reduced. It was evident that traditional railroad freight was being lost by New Haven and other railroads to competing modes of transportation. One example will illustrate this thesis. Not too long ago, the transportation of cement constituted a substantial part of the New Haven's business: the volume of cement it handled for the period 1955 to July 1959 averaged between 20,000 to 25,000 cars per year. During 1957, New Haven received more than \$6,500,000 in revenues from the transportation of cement or 7.4% of its total gross revenue. In 1958, it earned approximately \$4,500,000 from the transportation of cement or 6% of its gross revenue, but during the first seven months of 1959, New Haven derived only \$1,888,000 in revenues from cement transportation or 4% of its

gross revenue.<sup>7</sup> This precipitate reduction in cement traffic is attributable partly to the increasing volume of import cement which now reaches the New England market and mainly to the invasion of this transportation market by motor carriers. Add to this the radical change in the New England economy and the canvas is complete. There has been a virtual disappearance of the textile and allied industries, and the rapid development of the electronics industry. New Haven like other railroads continues to transport low rated coal but the high profit electronics traffic moves by trucks. As a consequence, rehabilitation for this ailing railroad, if not impossible, certainly calls for a miracle. A merger may be a temporary palliative but in the long run Governmental subsidy or even ownership, directly or through a separate agency (state or federal) is inevitable. Unless the conditions which culminated in the New Haven bankruptcy are understood and approached realistically, a nationalized railroad system may be the precursor of socialization of American business.

#### THE MERGER MOVEMENT

If inept or, even corrupt, rail management contributed to the debacle of the once powerful national railroad system, short sighted, if not rapacious trade union tactics acted as a catalyst. The recent study and report of the practices of railroad brotherhood by the President's Railroad Committee highlights, although it does not exhaust, the catalogue of labor abuses. Among other things, outmoded pay systems, egregious featherbedding, unnecessary jobs and needless intermediate terminals would be eliminated if the Committee's proposals are adopted. To be sure, there are opposing views, including those advanced by Leon Keyserling, the former Chairman of the President's Council of Economic Advisors. His report (commissioned by the Railway Labor Executives Association) calls for a halt to railroad mergers, pending an impartial study by a National Transportation Commission. Mr. Keyserling argues for an increase in job opportunities through an expanding national economy.

The principal thrust of labor's attack on the Committee's report is directed against the current wave of railroad mergers and consolidations. There are now some thirty railroad merger proposals. Three mergers, namely, the Norfolk and Western and Virginian, Erie and Delaware, Lackawanna and Western and Chicago and Northwestern and Minneapolis and St. Louis have been completed. As one writer points out:

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7. New England Transportation Company Extension — Cement No. MC-29250 (Sub-No. 6) (March 7, 1962).

The recently completed and proposed consolidations are expected to yield important cost savings, service improvements, and traffic advantages.<sup>8</sup>

Referring to the Erie-Lackawanna merger, he states:

Out of the \$13.5 million gain in net income expected as a result of the Erie-Lackawanna consolidation, it was estimated that over \$1.2 million would be derived from longer hauls, much of it at the expense of the lines connecting with the Lackawanna at Buffalo.<sup>9</sup>

But these savings have not been realized.

As one commentator points out, a consolidated system may become so large as to create new dislocations and larger losses:<sup>10</sup>

[W]here density is already high, enlargement of scale above a level of some 10,000 employees will most likely be accomplished by real diseconomies.

Instead, it is suggested that:

[M]uch more serious consideration should be given to the alternatives of coordination, for instance joint-track operation with abandonment of one or the other company's lines, to increase density without incurring the disadvantages of increased scale.<sup>11</sup>

It is evident that something more than, and different from, abandonment of passenger service and unprofitable freight lines, mergers and consolidations are required. Unless the gap between the actual output of the American economy and the output which could be achieved at reasonably full employment is closed, the dichotomy of over-capacity and vast and deepening pockets of want will not be rationalized. Railroads, singly or in combination, will succumb to

8. Harbeson, *New Patterns in Railway Consolidation*, 2 THE QUARTERLY REVIEW OF ECONOMICS AND BUSINESS 7, 11.

9. *Id.* at 12. This estimate was grossly optimistic. In 1961, the net loss suffered by Erie-Lackawanna Railroad for the ten months ended October 31, 1961 amounted to \$24,699,679.00 to a net loss in the comparable 1960 period of \$13,753,261.00 (57 Erie-Lackawanna Railroad Magazine 3, November-December, 1961).

10. HEALY, THE EFFECTS OF SCALE IN THE RAILROAD INDUSTRY (New Haven: Yale University, Committee on Transportation, 1961); NELSON, RAILROAD TRANSPORTATION AND PUBLIC POLICY 182 (Brookings, 1959). For a similar study in the motor carrier field, see Roberts, *Some Aspects of Motor Carrier Costs: Firm Size, Efficiency, and Financial Health*, 32 LAND ECON. 228 (1956).

11. HEALY, *op. cit. supra* note 10 at 5. Acquisitions and mergers involve important questions of monopoly (White, *Monopoly Under the Interstate Commerce Act*, 29 I.C.C. PRAC. J. 470 (1962); Brown, *The Interstate Commerce Commission and Monopoly — A Study of the Commission's Powers and Duties in the Antitrust Field*, 29 I.C.C. PRAC. J. 596 (1962); *Railroad Consolidations and the Public Interest* (Bureau of Transport Economics and Statistics I.C.C.) Statement No. 6201 (1962); Burstein, *Motor Carrier Acquisitions, Mergers and Consolidations*, 25 I.C.C. PRAC. J. 167 (1957).

rising costs, declining revenues and the incursion of their traffic by competing modes of transportation.

### CONGRESS AND THE RAILROADS

The Congressional approach to the monumental task of salvaging the national transportation system has been piece-meal and pedestrian. Congress has neither a vision of an ultimate purpose nor the capacity to expose the issues to the acerbic searchlight of relentless analysis. Statutory rubrics, standardized notions of what constitutes the appropriate ambit of regulation and a cautious, inadequate and circumambient courtship with limited reform has produced an expanded text of the Interstate Commerce Act without touching the high purposes of the National Transportation Policy. This is illustrated by the 1958 amendment to the Interstate Commerce Act,<sup>12</sup> which sought to preserve inter-modal competition by withdrawing from the Interstate Commerce Commission the power to suspend and reject the reduced rates of one carrier in order to protect the traffic of another mode of transportation.<sup>13</sup> Emergency measures may save the patient but they do not normally assure long life. Rate competition may open the traffic lanes but it will not assure profitability of operations, nor can it encourage economies or the increase in productivity which are the essential conditions for survival of any enterprise.

Railroads have not been saved by the 1958 amendment and the Interstate Commerce Commission has not succeeded in stemming the secular downward trend. To begin with, the powers of the agency are limited; second, the Commission operates in a vacuum and unless and until coherent and consistent national economic policies and goals are formulated and implemented, the Commission can function only through cumbersome rule making and adjudicatory processes; third, the Commission and its functions need to be reappraised, despite its recent soul-searching self-criticism which led to internal reorganization and commendable procedural reforms.

In a mature capitalistic economy, the government has the duty to oversee the conduct of economic affairs and, sometimes, to become part of the business process. An administrative agency must do more than mechanically apply statutory standards. An effective administrative agency is a governmental response to the felt needs of the com-

12. 72 Stat. 572, 49 U.S.C. § 15a (1958); Tobacco from Northern Carolina to Central Territory, 309 I.C.C. 347 (1960); Helmetag, Jr., *The Trend of the Commission's Decisions Under Section 15a(3) of the Interstate Commerce Act*, 29 I.C.C. PRAC. J. 725 (1962).

13. *New York, New Haven & Hartford Railroad Co. v. United States*, 199 F. Supp. 635 (D. Conn. 1961).

munity for participation in, or regulation of, business affairs affected with a public interest. The appropriate function of an independent regulatory agency is to employ the delegated powers of the Federal Government to deal with national economic and social questions with expertise and flexibility; to balance private rights and obligations with the rights of society as a whole and to protect each citizen by stamping individual rights with a public character; to obliterate the dividing line between state and federal powers so that a federal policy, self-conscious of its powers and responsibilities, may emerge:

In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems. It represents a striving to adapt governmental technique, that still divides under three rubrics, to modern needs and, at the same time, to preserve those elements of responsibility and those conditions of balance that have distinguished Anglo-American Government.<sup>14</sup>

In periods of crisis, governmental intervention through the vehicle of the administrative process is part of a master plan to preserve and stabilize the economic system by assuring fair competition and fair treatment to business, workers and the public generally:

The dominant theme in the administrative structure is thus determined not primarily by political conception but rather by concern for an industry whose economic life has become a responsibility of government.<sup>15</sup>

In areas of vital economic and social affairs, an agency may bridge the gap between the government and the citizen. To be sure, administrative agencies are sometimes guilty of abuses of power and invasion of the rights of citizens and do not always function expertly or with the expedition customarily associated with them. But they have the capacity to act or to compel action. For example, the Interstate Commerce Commission has rarely, if ever, been charged with abuse of power but its potential for progressive regulation has not been fully exploited.

#### THE ROLE OF THE COMMISSION

Appraisals of the Interstate Commerce Commission, its functions and contributions, fall into three broad categories: uncritical acceptance; uncritical denunciation; a balanced and circumspect review which looks toward an improvement in the administrative and decision mak-

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14. LANDIS, *THE ADMINISTRATIVE PROCESS* 12 (1938).

15. *Id.* at 12.



ing processes of the Interstate Commerce Commission. One writer<sup>16</sup> suggested that the Commission be abolished because it had ceased to act as a national coordinating agency in the field of transportation and accused it of a pro-railroad bias. A report by Dr. Walter Adams and Dr. James B. Henry<sup>17</sup> which attacked the Commission policy during the years 1950 to 1956 on trucking mergers and studied the effect of concentration on small business falls into the same category. Here the Commission was charged with prejudice for large trucking enterprises and with fostering mergers of large carriers. Other Congressional studies<sup>18</sup> relating to competition and regulation in the trucking industry reached the conclusion that the Commission had been unduly restrictive in interpreting the certificates of small carriers with the result that small carriers were being forced out of business.

In his report,<sup>19</sup> to then Senator Kennedy, Dean Landis emphasized the absence of clear policy guide lines and the failure of policy coordination between and among the Federal agencies:

A prime criticism of the regulatory agencies is their failure to develop broad policies in the areas subject to their jurisdiction. As this report noted earlier policy formulation can be made in various ways including the adjudicatory process. The failure to utilize other methods for policy formulation is due primarily to the pressure of business on the adjudicatory side.

"Policy formulation," unless required by the disposition of a particular case, means planning measures as how best to dispose of pending problems or how best to forecast and explore solutions to problems still on the horizon.<sup>20</sup>

Dean Landis pointed out that although the statutes which created the agencies required that plans of regulation be formulated which

16. Huntington, *The Marasmus of the I.C.C.: The Commission, the Railroads and the Public Interest*, 61 YALE L.J. 467 (1952).

17. *Trucking Mergers, Concentration, and Small Business: An analysis of Interstate Commerce Commission Policy, 1950-1960*, Report Prepared for the Select Committee on Small Business United States Senate, 85th Cong., 1st Sess. (1957); S. Rep. No. 1693, 84th Cong. 2d Sess.

18. *Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce on Investigation of the I.C.C.'s Administration of the Motor Carrier Act*, 86th Cong., 2d Sess. (1960). Subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, Investigation of Regulatory Commissions and Agencies, H.R. Rep. No. 1258, 86th Cong., 2d Sess. (1960).

19. The Report on Regulatory Agencies to the President-Elect by James M. Landis has no official title and is known as the "Landis Report." The Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 86th Cong., 2d Sess. (1960) has issued it in pamphlet form and references to pages herein are to this print. For a critical analysis of the *Landis Report* see McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373 (1961).

20. *Id.* at 13.

coordinate the policies and practices of the various agencies, none have been evolved. Hence, it is proposed that:

The evolution of a national transportation policy must have a close and intimate relationship to the President. To do so by the creation of an executive department, however, means the imposition of presently undefined executive duties in the head of that department. These duties could probably be more defined at a later date in the light of experience and then vested without too much controversy in an appropriate governmental unit. Meanwhile, development of the coordinating function could be placed in the Executive Order of the President.<sup>21</sup>

#### COORDINATION

The content of recent studies may vary but the basic conclusion is the same: there is an urgent need for a long range program of inter-agency cooperation and for a comprehensive national transportation policy. In the meantime, relief for the railroads must be found in a workable system of coordinating rail and other carrier facilities, but primarily, motor carrier. The palpable absurdity of an earlier intransigent refusal to recognize that truck transportation as a permanent economic institution is now recognized even by the Victorian mentality which still dominates some segments of the railroad industry.

Three techniques, now employed, create a framework for future coordination:

- (a) piggybacking and coordinated rail-motor service;
- (b) unrestricted motor truck operations both exempt and non-exempt; and
- (c) substitute motor-for-rail service.

The movement of truck trailers by rail and containerization is not a recent innovation,<sup>22</sup> but its widespread adoption has occurred only in the past several years. At present, five major arrangements or so-called "Plans" are used:

(I) This involves substituted rail for motor service in which the independent motor carrier literally operates over a rail line rather than on the highway. Neither an independent line-haul rail operation nor a joint-rate arrangement is required because the line-haul rail movement is performed under a motor common carrier's bill of lading

21. *Id.* at 35.

22. Motor-Rail-Motor Traffic in East and Midwest, 219 I.C.C. 245 (1936); Movement of Highway Trailers by Rail, 293 I.C.C. 93 (1954). Substituted Freight Service, 232 I.C.C. 638 (1939). For a review of the varieties of piggybacking, see Anderson and Loos, *Piggyback Plans*, 3 Bost. COLL. IND. & COM. L. REV. 335 (1962).

and the rate assessed by the railroad is a contractual, and not a tariff, charge made by the railroad to the motor common carrier for the rail portion of the haul and the railroad does not issue a bill of lading to the shipper for its portion of the movement.

(II) The railroad provides traditional rail service for the shipper but uses a trailer owned or leased by the railroad in substitution for a conventional box car or other freight train.

(III) The shipper owns or leases the trailer and engages the railroad to transport the trailer; the railroad offers a ramp to ramp service under a rail bill of lading issued directly to the shipper and the shipper provides its own pick up and delivery service or may engage a motor carrier to do so.

(IV) The shipper owns or leases the flat car and the trailer and engages the railroad to haul the flat car and trailer.

(V) A railroad or railroads join with a motor carrier or motor carriers to provide a coordinated rail-motor-rail or motor-rail-motor or rail-motor service under joint rates. In this instance, the rail carrier's service may extend beyond the authorized service area of the motor carrier or the motor carrier portion of the movement may reach areas outside of the terminal zones of the railroad.

Although the advance of piggybacking has been substantial since 1958, its volume is still relatively low due, partly, to the lack of standardized equipment in use on the nation's railroad system. In 1958, 420,000 truck trailers were carried; in 1959 the number rose to 700,000. From 1957 to 1958, piggyback loadings rose 11%; at the same time, car loadings fell 15%. For the fifty weeks ending December 30, 1961, 591,246 cars were involved and this was 6.7% and 42.0% higher, respectively, than the 554,115 cars loaded in the corresponding fifty-two weeks of 1960 and the 416,508 cars loaded during the comparable fifty-two weeks of 1959.<sup>23</sup> No breakdown of the data showing the number of piggyback movements under Plan V is available, but it is safe to say that the potential of this kind of rail-motor coordination is still unrealized despite the encouragement given by the Interstate Commerce Commission. Authority for joint motor-rail service is found in Section 216(c) of the Interstate Commerce Act which provides, in pertinent part:

Common carriers of property by motor vehicles may establish reasonable through routes and joint rates, charges, and classifica-

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23. I.C.C. Bureau of Transport Economics and Statistics, *Transport Economics*, January 1962, p. 8. The number of railroads participating in piggybacking rose from 88 in 1958 to 250 in 1961 (75 I.C.C. Ann. Rep. 83, 1961).

tions with such other carriers or with common carriers by railroad and/or express and/or water; . . . .<sup>24</sup>

In *Movement of Highway Trailers By Rail*,<sup>25</sup> the Commission said:

Section 216(c) of the act specifically authorizes the establishment of motor-rail joint rates. Such arrangements were considered and approved by us in *Motor-Rail Motor Traffic in East and Midwest*, *supra*.

Coordinated joint service by rail and motor carriers has been urged upon common carriers for many years by members of Congress and the Commission. Commissioner John H. Winchell, then Chairman of the Interstate Commerce Commission, appearing before the Transportation and Aeronautics Subcommittee of the House Committee on Interstate and Foreign Commerce said, in part:

It is our considered view that the present and future public interest requires that there be made available to shippers a ready choice of all modes of carriage. At the same time, there should be some workable method of flexibility whereby shippers can utilize the various inherent advantages of each mode in coordinated movements of single shipments. The Commission has generally been of the view that this type of service is needed, but we have had some reservations concerning the manner in which it should be brought about. Specifically, we have felt that during the evolutionary period while this type of service was being developed, efforts by independent carriers to accomplish coordinated service through voluntary concurrence in through routes and joint rates should receive every encouragement. The present law, of course, permits such voluntary arrangements, and we believe that both the Commission and the Congress should do all they can to foster growth of such a trend.

We feel that the carriers themselves have within their power the opportunity to demonstrate economies, efficiencies, and advantages to the shipping public through practical operation of voluntary coordinated systems. The expanding plans involving "piggyback," "fishyback," and "flyaway" service, using easily interchangeable containers, are offering real encouragement along these lines, with the next probable development being a movement towards the standardizing of such containers.<sup>26</sup>

#### MOTOR CARRIAGE BY RAILROADS

Railroads which continue to resist coordination apparently believe that the real solution to their perplexing problem consists of a program of abandonment of less-than-carload traffic or its diversion to trucks

24. Interstate Commerce Act § 216(c), 49 U.S.C. § 316(c).

25. *Supra*, note 22 at 105.

26. 27 I.C.C. PRAC. J. 608, 609 (1960).

operated without restriction as to territory or service. All railroads now recognize the need for an affiliated and controlled substituted motor transportation service and are virtually unanimous in their demand for complete freedom of truck operations.

In his testimony before the Senate Subcommittee on Surface Transportation, Daniel P. Loomis said:

We are convinced that it would be in the public interest to permit railroads and their affiliates to enter into, or acquire existing rights to engage in motor, water or air transportation on the same basis as any nonrailroad operator.<sup>27</sup>

Since 1935, the motor carrier operations by railroads have consisted of one or a combination of the following activities:

- (1) Local pick-up and delivery services;
- (2) Substituted-motor-for-rail operations directly or through subsidiaries or affiliates or independent motor carriers operating under exclusive contract with the railroad;
- (3) Unrestricted motor carrier operations conducted directly or through subsidiaries and affiliates.

#### LOCAL PICK-UP AND DELIVERY

Transfer, pick-up and delivery services performed within the terminal area of the railroad are exempt from the provisions of Part II of the Act, but continues to be regulated under Part I.<sup>28</sup> The landmark case in this area is *Scott Bros., Inc., Collection and Delivery Service*.<sup>29</sup> Scott applied for a permit to engage in operations as a contract motor carrier in collection and delivery service for the Pennsylvania Railroad and the Long Island Railroad in Manhattan, Queens, Brooklyn and the Bronx, and agreed to restrict its service to the two railroads under special written agreements. Reviewing this proposal, the Commission held that:

The collection and delivery service in question is a service within terminal districts which the railroads undertake to perform for the public. They provide for it in their tariffs, it is covered by their contract of carriage with the shippers, and they hold themselves responsible for any loss or damage to the cargo in the course of the service. Although not performed on rails, it is an

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27. *Hearings on Problems of the Railroads Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. Pt. 1, at 26 (1958). See also the statement by A. E. Perlman, President of the New York Central Railroad at 227.

28. Interstate Commerce Act § 202(c), 49 U.S.C. § 302(c) (1958).

29. 4 M.C.C. 551, 552-553 (1936).

integral part of railroad service, subject to part I of the Interstate Commerce Act.

### SUBSTITUTED SERVICE

The type of motor carrier service most frequently authorized for railroads is substituted motor-for-rail service, provided by:

(a) independent motor carriers holding specific authority to render such service;

(b) subsidiaries or affiliates of railroads.

The New York, New Haven & Hartford Railroad, the Pennsylvania Railroad, Boston & Maine, and St. Louis-Southwestern were the early pioneers in substituted motor-for-rail service. But the bulk of substituted operations was limited to the movement of less than carload traffic to a limited number of transfer points over distances of approximately fifteen to twenty miles in either direction from a concentration point.

The cases are legion but the governing principles are clearly set forth in the landmark case of *Kansas City S. Transport Co., Inc.*, Common Carrier Application.<sup>30</sup> In that case, the applicant, a wholly owned subsidiary of the Kansas City Southern Railway Company, filed both a grandfather application and an application under section 207 in which it sought only to serve those points which were stations on the line of its parent railroad and on the line of the Arkansas Western Railway. This amounted simply to a substitution of motor carrier service for rail-station-to-station way-freight service. Approval of the application was urged on the grounds that:

- (1) service on less than carload (LCL) traffic would improve;
- (2) the amount of LCL freight handled would increase;
- (3) cost per unit of freight handled would be reduced;
- (4) existing motor carriers would not be adversely affected since no one motor carrier could serve all points;

(5) the service would be different from that of a motor carrier service;

(6) the facilities of existing carriers could not be used because a unity of operations between the railroad and the motor carrier was required;

(7) it would be impossible to coordinate service if traffic was handled by various motor carriers.

The Commission concluded that the proposal contemplated a new type of service which could not be performed either by the railroad

30. 10 M.C.C. 221 (1938). Compare Seaboard Airline Railroad Co., Modification, 79 M.C.C. 375 (1959).

alone or by a motor carrier alone and rejected the argument of protesting motor carriers that the railroad should be compelled to utilize existing motor carriers because of the absence of adverse effect upon them. On the contrary, the Commission found that since the applicant and the railroad would make use of joint facilities and employees and would interchange traffic and adjust their schedules, only common management and control could guarantee dependable operations. Moreover, said the Commission, the public should not be deprived of the proffered service merely because there may be some diversion of traffic from motor carriers to the railroads. However, the Commission stopped at this point. Finding no proof of need for a motor carrier service divorced from the rail system, a certificate was issued with the following conditions:

1. the service to be performed by applicant was limited to service which is auxiliary to, or supplemental of, rail service of the Kansas City Southern Railway Company or the Arkansas Western Railway;
2. applicant was prohibited from serving or interchanging traffic at any point not a station on a rail line of the railways;
3. shipments transported by applicant were limited to those which it received from, or delivered to, either one of the railways under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail;
4. all contractual arrangements between applicant and the railways were to be reported to the Commission and were subject to revision if and as the Commission found it necessary in order that such arrangements shall continue to be fair and equitable to the parties;
5. such further specific conditions as the Commission in the future might find it necessary to impose in order to restrict applicant's operation to service auxiliary to, or supplemental of, rail service.

Recently, in *New England Transportation Company Extension — Cement*,<sup>31</sup> the Commission (Division 1) defined the "prior" and "subsequent" limitation when it rejected a claim by applicant that:

[A] restriction requiring a "prior" movement by rail does not preclude it from handling shipments which would be proscribed by an "immediate prior" restriction. Both terms have been used interchangeably by the Commission and appear to have been understood by the regulated transportation industry as being identical in meaning. For example, in *Northern Pacific Transport Co. Ext. — Pacific Coast Points*, 81 M.C.C. 375, 384, the Commission stated in its report that it would impose a restriction requiring "a prior or subsequent movement by rail," but the restrictions,

31. Docket No. MC-29250, Sub-No. 6, Mar. 7, 1962, 14 Fed. Carr. Cas. 35, 380.

as actually imposed required "an immediately prior or immediately subsequent movement by railroad." In addition, the Commission has imposed "prior" rail-haul conditions in some cases and "immediately prior" rail-haul conditions in other cases without any indication that a different meaning was intended. Compare *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, 240, with *Smoky Mountain R. Motor Carrier Application*, 34 M.C.C. 191, 194.

Since the date of the *Kansas City* decision, the Commission has substituted for the requirement of a prior or subsequent rail haul, the key point form of condition. In all other respects, certificates issued to railroads and rail subsidiaries contain the restrictions in substantially the form developed in the *Kansas City* case, and the United States Supreme Court, in *Interstate Commerce Commission v. Parker*,<sup>32</sup> sustained the power of the Commission to restrict operations to those which were "truly supplementary or auxiliary to rail traffic."

In *New York Central Railroad Company — Extension — Lines East*,<sup>33</sup> applicant sought a certificate authorizing operation, as a common carrier by motor vehicle, of general commodities, over forty-five regular and alternate routes generally paralleling applicant's lines of railroad within the States of New York, New Jersey, Pennsylvania, Massachusetts, Ohio, Michigan, Indiana and Illinois, serving intermediate points and specified off-route points which are stations on the rail lines of the railroad and subject to the following conditions:

(1) the service by motor vehicle to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, its rail service; and

(2) any point not a station on its line of railroad shall not be served by applicant.

Approving the application, Division 1 of the Commission enunciated the following principles:

As stated by the examiner, we have consistently found in cases too numerous to cite that public convenience and necessity require the issuance of substituted service authority to the railroads for the purpose of replacing uneconomical peddler cars in which less-than-carload freight is required to be handled in volumes and on schedules insufficient to warrant a profitable and reasonable satisfactory service by rail. The reduction in railway operating costs and the increase in efficiency of the resulting transportation service

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32. 326 U.S. 60 (1945).

33. 68 M.C.C. 459 (1956).



enure to the benefit of the public and the carrier and are responsive to the public demand and need.<sup>34</sup>

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In granting such authority in the face of reasonably adequate motor-carrier service, we have made a practice of imposing certain conditions designed to maintain the railroad entry into the motor carrier field in a status which is auxiliary to, and supplemental of, the rail service for which it was to be substitute. Aside from the general restrictions to service at rail points and the reserved right to impose future modifications or restrictions on the authority issued, the degree of operational flexibility has been controlled specifically by two types of conditions, one requiring that shipments so transported have an immediately prior or subsequent movement by railroad, and the other requiring that key points between which traffic moves in sufficient volume to warrant movement and concentration by rail car. These two conditions have been used alternatively to supply the needed restriction, depending upon which would most suitably accomplish the basic objectives in a given case. They were not designed to be applied concurrently over the whole of a railroad's substituted service routes. In recent years the key-point form of condition has been utilized in most instances because the terms of the former condition have made it necessary for the railroads to continue their peddler-car service at smaller points on either side of the boundary line between two States in order to afford such interstate traffic the prior or subsequent rail haul required. This was found to limit seriously the benefits, economy and efficiency of service which the substitution of trucks was intended to produce. Despite the position of some of the protestants, a prior or subsequent rail haul condition would not be appropriate on the type of operation involved herein.<sup>35</sup>

In *Pacific Motor Trucking Company*,<sup>36</sup> a modified principle was enunciated. There, a contract carrier permit was granted without the usual key-point restriction. The sole condition imposed was that the points to be served had to be points on the railroad's line. In a most recent decision, key point zones were recommended by an Examiner and generally approved by the Interstate Commerce Commission.<sup>37</sup>

34. *Id.* at 464, 465.

35. *Id.* at 465.

36. 71 M.C.C. 561 (1957), 77 M.C.C. 605 (1958). A three judge statutory court sustained the order of the Interstate Commerce Commission in *American Trucking Associations, Inc. v. United States and Interstate Commerce Commission* (170 F. Supp. 38 (D.D.C. 1959)), but on appeal the United States Supreme Court remanded because the Commission had failed to impose the usual restrictions and failed to determine whether "special circumstances" existed which would warrant relief from these conditions (364 U.S. 1, 1960). Upon remand, the Commission denied the application. (84 M.C.C. 575, 1961).

37. Docket No. MC-67916, Sub-No. 3, May 16, 1962, 14 Fed. Carr. Cas. 35, 422.

Summarily stated, the prevailing doctrines are these:

1. substituted motor-for-rail service requires specific authority whether it is conducted by the railroad itself or through its subsidiary or by an independent motor carrier, and this activity constitutes a motor carrier, and not a rail operation;
2. the motor carrier operations must be "auxiliary to, or supplemental of," the rail service;
3. service will be authorized only to points that are stations on the lines of the railroad and all shipments must move on a rail bill of lading and at rail rates;
4. no shipment may be transported between any of the points specified in the certificate, or through, or to, or from more than one of the key points or, alternatively, shipments must have a prior or subsequent movement by rail or, alternatively, key point zones rather than particular cities may be established;
5. all agreements between the railroad and the motor carrier must be reported to the Commission and are subject to revision to assure that the arrangements between the parties are and will continue to be fair and equitable;
6. the Commission reserves the right to make such further changes and modifications in the future to make certain that the motor carrier service will remain auxiliary to, or supplemental of, the rail service.

#### RESTRICTED VERSUS UNRESTRICTED OPERATIONS

The real battle-lines have been drawn over the issue of restricted versus unrestricted motor carrier service by railroads. Almost at the beginning of its administration of the Motor Carrier Act, the Commission found a Congressional intention to restrict rail-motor carrier operations. In the *Barker* cases,<sup>38</sup> the Commission held that it would not approve operations by railroads or their affiliates which competed with other railroads or established motor carriers, or invaded a territory already adequately served by another rail carrier.

. . . [W]e are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213 is evidence that Congress was not convinced that this should be done.<sup>39</sup>

38. *Pennsylvania Truck Lines, Inc. — Control — Barker*, 1 M.C.C. 101 (1936); 5 M.C.C. 9 (1937).

39. 1 M.C.C. at 111, 112.

Does this mean that a railroad may not engage in unrestricted motor carrier operations? The answer is "no." There are, in fact, a number of railroads which own and control motor carriers engaged in independent and unrestricted motor carrier operations. The New England Transportation Company (a wholly owned subsidiary of the New Haven Railroad) is an illustration of a railroad motor carrier subsidiary authorized to conduct unrestricted motor carrier operations.

Unrestricted rights may have been inherited or acquired. Thus, a motor carrier subsidiary may acquire unrestricted operating authority under Section 207 of the Interstate Commerce Act, or under section 5<sup>40</sup> and the governing criteria were enunciated in a limited number of major cases. In *United States v. Rock Island Motor Transit Company*,<sup>41</sup> the facts were these: the Commission granted the Rock Island Motor Transit Company, a wholly owned subsidiary of Chicago, Rock Island and Pacific Railway Company, an unrestricted certificate to engage in motor carrier operations but reserved jurisdiction to impose further restrictions so as to assure that the service would be auxiliary to, and supplemental of, rail service. In 1944, Rock Island acquired the certificate of another carrier through a section 5 proceeding, but the Commission did not issue a certificate. Later, in 1945, the Commission, on its own motion, reopened the proceedings in order to determine whether the usual restrictions should be imposed on both the earlier and the subsequently acquired certificates and it elected to do so. Upon review, the United States Supreme Court held, first, that the Commission could reopen a case and impose restrictions on new certificates issued under section 207 to assure a service exclusively auxiliary to, or supplemental of rail service, so long as it specifically reserved the power to do so; second, that in the acquisition proceedings, the Commission was able to impose any restrictions since only an order of approval was outstanding and until a certificate was actually issued, there was no final order; third, that the construction given by the Commission to the phrase "auxiliary to and supplemental of rail service" was correct.

In the second *Rock Island* case,<sup>42</sup> Rock Island Motor Transit Company filed an application under section 207(a) and, once again, a certificate was issued without restrictions but with a retention of jurisdiction to impose restrictions, if these proved warranted by future

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40. 49 U.S.C. § 307; 49 U.S.C. § 5 (1958).

41. 340 U.S. 457 (1951).

42. *American Trucking Associations, Inc. v. United States*, 355 U.S. 141 (1957). For a review of the leading authorities see, Beardsley, *Restrictions Against Rail Entry into Other Transportation Fields*, 24 LAW & CONTEMP. PROB. 43 (1959).

conditions, and a right to review all agreements between the subsidiary and the parent railroad.

When the case reached the United States Supreme Court, representatives of the trucking industry argued that the Commission had no power to grant an unrestricted certificate under section 207 to a motor carrier affiliate or subsidiary of a railroad or to a railroad directly, because the standards enacted into section 5 were applicable to section 207. This contention was rejected by the Supreme Court when, comparing the language of 207(a) with the text of section 5(2)(b), it found no requirement that a certificate issued under section 207 be limited to service which is auxiliary to, or supplemental of, rail service. At most, said the Supreme Court, the Commission could use the standards prescribed in section 5(2)(b) as a guide, but not a legislative strait-jacket in issuing certificates under section 207. The teaching of the decision appeared to be that:

1. The Commission may issue an unrestricted certificate under section 207 to a motor carrier affiliated with, or controlled by, a railroad if "special circumstances" are present.

2. The term "special circumstances" means in effect that existing carriers have not furnished adequate service and the issuance of the certificate will not unduly restrain competition.

3. In a section 5 proceeding, on the other hand, restrictions must be imposed although decisional precedents indicated that the Commission had granted unrestricted authority in section 5(2)(b) cases and had granted temporary authority to railroads to operate the properties of motor carriers without restriction.<sup>43</sup>

Another important case which reached the Supreme Court was *American Trucking Associations, Inc. v. Frisco Transportation Company*.<sup>44</sup> Here, the relevant facts were that in 1939 Frisco Transportation, wholly owned subsidiary of the St. Louis-San Francisco Railway Company, acquired various certificates by purchase from existing motor carriers, which the Commission approved without any restrictions except for a reservation to impose conditions, in the future, deemed necessary to assure that the service to be performed would be auxiliary to, and supplemental of, rail service. In 1942, motor carrier certificates were issued to Frisco Transportation which contained neither restrictions nor any reservation to add these later on. Then in 1945, the Commission instituted proceedings to determine whether the usual

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43. *Burlington Transportation Company — Purchase — Hartell Truck Lines, Inc.*, 38 M.C.C. 497 (1942).

44. 358 U.S. 133 (1958). Cf. *Baggett Transportation v. United States*, — F. Supp. — (D. Ala. 1961), 31 U.S.L. Week 2007; *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961).

restrictions should be imposed and in 1953, the Commission ruled that the omission of the restrictions was inadvertent and that these could and should be written into the certificates.<sup>45</sup> An appeal was taken to a three-judge statutory court which reversed the Commission,<sup>46</sup> holding that the claim of a clerical error was without merit and, further, the Commission was virtually revoking the certificates contrary to the provisions of Section 212 of the Interstate Commerce Act. On appeal, the United States Supreme Court reversed the District Court and affirmed the order of the Commission, holding that there had been an inadvertent administrative ministerial error which the Commission had the power to correct, thereby nullifying the lower court's determination that there had been an attempted revocation of the certificates. But there was one important footnote<sup>47</sup> in the opinion, namely, a comment by the Court that it had not yet decided, in any case which involved an application by a railroad or railroad affiliate to engage in motor carrier operations pursuant to a section 5 proceeding, that restrictions must be imposed so as to assure that the service will be auxiliary to, or supplemental of, rail service.

A partial clue to the answer was provided by the legislative and statutory history of the original Motor Carrier Act which included section 213<sup>48</sup> (covering acquisitions, consolidations and mergers). This section was amended in 1938 to provide that if a rail carrier or any person controlled by or affiliated with, a rail carrier is an applicant, the application was not to be approved unless the Commission finds:

That the transaction proposed will promote the public interest by enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.<sup>49</sup>

Section 213 was repealed by the Transportation Act of 1940<sup>50</sup> and section 5 of Part I was incorporated into Part II. Subdivision 2(b) of section 5 which deals with railroad acquisitions of motor carriers provides, in essence, that if a railroad or a person controlled by, or affiliated with, a railroad is an applicant in a transaction involving a motor carrier, the Commission is not to approve the application unless it finds that:

45. Frisco Transportation Company Extension — Joplin — Miami, 62 M.C.C. 367 (1953).

46. Frisco Transportation Company v. United States, 153 F. Supp. 572 (E.D. Mo. 1957).

47. *Supra*, note 44, fn. 5.

48. Motor Carrier Act of 1935, ch. 498, § 213(a)(1), 49 Stat. 556.

49. Ch. 811, §§ 12-14, 52 Stat. 1239, 1240 (1938).

50. Ch. 722, Title I, § 21(e), 54 Stat. 924.

- (1) the transaction is consistent with the public interest; and
- (2) the transaction will enable the railroad or its subsidiary or affiliate to use such service by motor vehicle to public advantage in its operations; and
- (3) approval will not unduly restrain competition.

Complementing these standards is a requirement for a public hearing "unless the Commission determines that a public hearing is not necessary in the public interest."

Reading section 5, in its own way, the Commission did grant unrestricted motor carrier rights to railroad subsidiaries or affiliates. Indeed, in the first *Rock Island* case, the Commission plainly held that neither section 207 nor section 213 proscribed the grant of unrestricted rights to railroads.

In *Louisville and New Albany and Corydon Railroad — Purchase — Meerman*,<sup>51</sup> the Commission approved an application to acquire motor carrier certificates which would authorize service between the two points on the railroad's line and points in Kentucky. According to the Commission, the requirements of section 5(2)(b) were satisfied because acquisition of the motor carrier rights would enable the railroad to balance its operations and make possible the continuance of its rail operations. Further, the Commission found that there would be no adverse effect on motor carriers. And a similar result was reached in *Cranberry Corporation — Control and Merger — ET & WNC Motor Transportation Company; Purchase — W. S. Magill*.<sup>52</sup>

The definitive declaration on this issue was made in two cases, *American Trucking Associations v. United States*,<sup>53</sup> and *American Trucking Associations v. United States*,<sup>54</sup> which delineated the limitations upon the right of the Interstate Commerce Commission to issue unrestricted motor authority to railroad subsidiaries. In the first cited case<sup>55</sup> the Court referred to its prior approval of "this long administrative practice" of limiting motor truck operations for railroads to auxiliary and supplemental service. It approved, by inference, the Commission's rationale that the fact that "authorized independent motor carriers have not furnished the needed service except where it suited their convenience" constituted "special circumstances" authorizing a grant of unrestricted authority. In the second case,<sup>56</sup> the Court

51. 45 M.C.C. 6 (1946).

52. 37 M.C.C. 253 (1941); 38 M.C.C. 113 (1942).

53. *Supra*, note 42.

54. 364 U.S. 1 (1960).

55. *American Trucking Association, Inc. v. United States*, *supra*, note 42, at 148, 149-150.

56. *American Trucking Associations, Inc. v. United States*, *supra*, note 44, at 13, 14, 15.

refused to accept as "special circumstances" sufficient to justify unrestricted motor service by the rail affiliate there involved, the fact that auxiliary and supplemental limitations would not be compatible with the contract carrier service sought to be rendered. In this connection it noted specifically that the Commission has made "no finding that independent contract carriers were unable or unwilling to perform the same type of service as" the applicant.

Recently, the Interstate Commerce Commission approved the grant of unrestricted common carrier certificate to Black Diamond Transport Company,<sup>57</sup> a wholly owned subsidiary of the Lehigh Valley Railroad Company, to transport cement (although similar authority was denied as to five other wholly owned motor carrier subsidiaries of railroads). The Commission predicated a finding of special circumstances on the great dependence of the parent Lehigh Valley Railroad upon cement traffic, so that any diversion would seriously affect its operations.

The cases which sanctioned unrestricted motor carrier operating rights, in section 5 proceedings, established the following principles:

(1) The railroad applicant must prove a compelling economic need for relief;

(2) acquisition of motor carrier authority will produce substantial operating economies and will materially improve transit time;

(3) the railroad is not a large transportation system and, hence, it lacks the vast resources which may be employed to convert the motor carrier operation into a "fighting ship" or mammoth motor carrier;

(4) approval will not restrain competition; or

(5) motor common carriers are not providing adequate service in the involved territory.

The circumstances which will induce the Commission to deny an application for unrestricted authority were adumbrated in a series of important cases of which *The New York Central Railroad Company — Extension — Congers, N.Y. — Jersey City, N.J.*,<sup>58</sup> is the most instructive. Briefly, the New York Central Railroad sought authority, as a motor common carrier, to transport general commodities between Congers, New York and Jersey City, New Jersey, serving various intermediate points (a distance of thirty-four miles). The railroad was willing to limit the authority to permit service only to points on

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57. Black Diamond Transport Company Extension — Cement, Docket No. MC-118621, Sub-No. 2, Aug. 1, 1961. For a review of the relationship between piggybacking and restrictions upon rail motor carrier operations, see National Auto Transporters Association, Petition for a Declaratory Order, 15 Fed. Carr. Cas. 35, 377 (1962).

58. 61 M.C.C. 457 (1952).

the rail line, but was unwilling to be limited to the handling of shipments which had an immediately prior or immediately subsequent movement by rail. Only one motor carrier intervened. The Examiner approved the application without any restriction, but the Commission disagreed:

Where a certificate is sought to engage in the transportation of general commodities and to serve a public already served by motor carriers, the burden is upon applicant to show that the latter are not rendering a type or character of service which satisfies the public need and convenience and that the proposed service would tend to correct or substantially to improve that condition. We have consistently declined to grant operating authority where it appears that facilities are adequate to handle properly all presently available traffic and definitely foreseeable traffic for the reason that the maintenance of sound economic conditions in the motor carrier industry would be jeopardized by allowing another carrier to enter the field in competition with existing carriers which are ready and able to furnish adequate, efficient, and economical service if given the opportunity. We are of the opinion that the application should be denied.<sup>59</sup>

It is manifest that despite the difference in language in section 207 and section 5, namely, "public convenience and necessity," as opposed to "consistent with the public interest," the Commission virtually requires traditional proof of public convenience and necessity when it enjoins railroads to show the existence of "exceptional circumstances" in a section 5 acquisition case.

Although the Commission seems disposed to grant some relief from key point conditions (as indicated by support for the establishment of "key point zones"), it is evident that in the absence of an amendment to the Interstate Commerce Act or a complete change in the composition of the Commission or the adoption of a new philosophy of regulation, railroads will be precluded from engaging in unrestricted motor carrier operations.

Basic to the present doctrines which guide the Commission is its concept of the national transportation policy which commands the protection of the various modes of regulated carriage. Nevertheless, the Commission is disposed to assist the railroads in selected areas as illustrated by a liberal approach to piggy backing and a willingness to review its own theories of rate making insofar as they apply to small packages and volume shipments. For their own part, railroads are competing more aggressively with motor carriers and have engaged

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59. *Id.* at 462. However, the Commission (Division 5) on further hearing, 63 M.C.C. 441 (1955), revised its prior findings in 61 M.C.C. 457.



in various programs of streamlining their operations. But more is needed. It is evident that the promise of salvation lies not in mergers or consolidations, but in a comprehensive program which contemplates elimination of wasteful facilities and featherbedding and in a positive approach to coordination with motor carriers.

### CONCLUSION

Until Congress mandates effective and practical coordination of the facilities of all carriers, the course of regulation will be tortured and uneven and America's transportation system will be seriously, if not permanently, impaired. The history of our railroads teaches important lessons which must<sup>60</sup> become a primer for all private enterprise. It becomes increasingly evident that the government must secure an inventory of facilities and it must formulate or encourage the development of a coherent national economic policy. This may call for a commitment to extensive tax relief<sup>61</sup> and to economic planning so that the use of productive facilities which are competitive and frequently duplicative will promote the best interests of all segments of our industrial society and, most important, that a free enterprise economic system may survive.

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60. There has been no paucity of investigations and commentaries even though there has been a poverty of ideas, *e.g.*, H.R. Rep. No. 2711, 85th Cong. 2d Sess. (1959); Staff of the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 86th Cong. 2d Sess., Report Pursuant to § 136 of the Legislative Reorganization Act and H. Res. 56 (Comm. Print 1960); Secretary of Commerce, A Report to the President; Issues Involved in a Unified and Coordinated Federal Program for Transportation (1950); Hector, *Memo-randum to the President: Problems of the C.A.B. and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Chase, *The Crisis Behind the Transportation Mergers*, 45 The Saturday Review 19 (1962); I.C.C. Bureau of Transport Economics and Statistics, *Railroad Consolidations and the Public Interest*, Statement No. 6201, File No. 51-D-8 (1962); Melton, Jr., *Transport Coordination and Regulatory Philosophy*, 24 LAW & CONTEMP. PROB. 622 (1959).

61. Speech of A. E. Perlman before the Westchester County Association, Nov. 25, 1958.